

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1415

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

LUIS A. MENA,

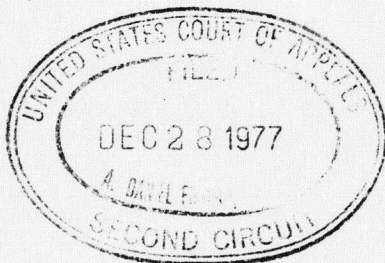
Appellant.

12/28

By mail

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BRIEF AND APPENDIX FOR APPELLANT



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-against-

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PRELIMINARY STATEMENT

Defendant-Appellant, hereinafter referred to as "Appellant", has been granted permission by this Court to appeal as a poor person on the original record and typewritten brief. The appendix method is not being used.

Counsel for Appellant requires oral argument. Appellant's appeal is directed to the question of photographic evidence having been allowed into the case as relevant, which photographic evidence caused confusion and undue prejudice to the jury. Thus, any assistance and enlightenment offered by the given photographs failed to outweigh the confusion and undue prejudice resulting from their admission.

This appeal is from a judgment rendered on July 21, 1977, convicting Appellant of Counts 1 and 2 of a 2-count indictment after a full trial by jury before the Honorable Mark A. Constantino.

Count 1 of the indictment charged the Appellant with the possession with intent to distribute approximately one-eighth of a

kilogram of cocaine on the night of December 16, 1976, in the Eastern District of New York. Count 2 of the indictment further charged the Appellant with the actual distribution of the same one-eighth of a kilogram of cocaine on the same night of December 16, 1976, in the Eastern District of New York.

SUMMARY OF ARGUMENT

A directed verdict of not guilty on both counts should have been granted by the Judge when the testimony of the Government's rebuttal witness, agent Ridler, conflicted with the testimony of the Government's two direct witnesses, agents Papantoniou and Sears with respect to the position of the automobile.

This coupled with the admitting into evidence of adulterated photographs of the area wherein the representation of the area by the photograph was not fair and accurate but required a fence to be marked in by agent Papantoniou to properly describe the area was highly prejudicial to the Appellant.

With the area having been substantially changed by the removal of a fence which could have inhibited the vision of surveillance agents at the scene of the crime, the admitting into evidence of such photographs, even though they were marked up, would strongly prejudice the jury in accepting marked-up photographs without relying on their remembrance of the testimony of the agents.

The Government's remarks in the closing statement and questioning of the Appellant in cross-examination into the question of whether the Appellant hired an investigator to determine the identity and the location of the other party

allegedly in the automobile during the criminal transaction was highly prejudicial to the Appellant, as was the continual emphasis by the Government on the fact that the Appellant had a wife and children in Columbia and a girlfriend in New York.

Lastly, the Government prejudiced the Appellant by its closing statement wherein it sought to make the Appellant appear to have lied on the stand with respect to his statements that he could only say a few words in English. The Government knew that the Appellant had been studying English during the period of incarceration in Metropolitan Correctional Center and thus had a much firmer grasp of the English language at the time of the trial in contrast to the Appellant's grasp of the English language at the time of the crime, and thus its closing statements were highly prejudicial to the Appellant.

QUESTIONS PRESENTED

POINT I

A DIRECTED VERDICT OF NOT GUILTY
SHOULD HAVE BEEN GRANTED AFTER
TESTIMONY OF THE GOVERNMENT'S
REBUTTAL WITNESS CONFLICTED WITH
THE TESTIMONY OF THE GOVERNMENT'S
DIRECT WITNESSES.

At the conclusion of the Government's rebuttal witness, Appellant's attorney made an application for a directed verdict of not guilty for Luis A. Mena on the ground that the rebuttal witness' testimony was substantially different from the testimony of the other agents (186). The rebuttal witness' testimony, which was used to bolster the presence and position of both the Appellant's vehicle and agent Papantoniou's vehicle at the scene of the crime (179, 180) contradicted the direct testimony of

agent Papantoniou's statements where the same vehicles were located, under the Brooklyn Queens Expressway (43). Agent Papantoniou's testimony stated that the Government vehicle was to the left of the Appellant's Pontiac, while agent Ridler's testimony (180) placed the Government's vehicle to the right of the Appellant's vehicle.

The position of the vehicles was so critical to the testimony of the Government's witnesses in placing Appellant's vehicle under the Brooklyn Queens Expressway in order to effectuate the sale of cocaine, that the contradictory statements as to the location of the vehicle would place a serious cloud on the presence of the Appellant's vehicle under the Brooklyn Queens Expressway on the night in question. This, coupled with the Appellant's taking the stand in his own behalf and stating that he was not the owner of a Pontiac and had sold the Pontiac on December 20, 1976 (145), would be sufficient grounds for the trial judge to grant a directed verdict of not guilty on the grounds that the Government had failed to prove their case beyond a reasonable doubt.

POINT II

THE COURT SHOULD NOT HAVE ADMITTED
INTO EVIDENCE PHOTOGRAPHS OF THE
AREA WHERE THE CRIME TOOK PLACE
WHICH DID NOT FAIRLY AND ACCURATELY
DEPICT THE AREA.

The introduction of Exhibits 2A through 2F by means of the direct testimony of agent Papantoniou described these exhibits as (36)

"They are photos of the area where the
meeting took place with Luis Mena."

Further, with respect to the time of the photographs, agent Papantoniou testified that these photographs were taken

"approximately two weeks ago". Further, when agent Papantoniou was questioned as to whether the pictures were a fair representation of the area as he saw it on the night of December 16, 1976, the agent answered (37)

"Except for the fact that there was a fence up at the time."

The following questions and answers were asked by the Government of agent Papantoniou.

Q. "Can you state where the fence was?"

A. "Right along the curb on both sides."

Q. "Referring to Exhibit 2A, can you tell us, can you show us with a red pencil or mark with a red pencil the outline of the area where the fence was?"

This was objected to by the Appellant's attorney on the basis that it was not representative of the area on the night in question.

As is stated in American Jurisprudence Proof of Facts Annotated, Volume 9, Page 149, the last paragraph,

"Photographs are relevant if they either assist witnesses in presenting and explaining their testimony or aid the jury in understanding the issues in the suit, but the trial judge must determine whether the assistance and enlightenment offered by a given photograph outweigh the confusion and undue prejudice that might result from its admission."

Photographs put in the minds of the jurors something that actually is taking place in front of them, especially with the advent of television. People are more prone to believe that which is shown pictorially in front of them than that which is told to them, especially when it is a photograph or a movie picture. Not only had the fence, which might have interfered with surveillance on the night of December 16, 1976, been removed from the

scene in the picture, but further, the cars were depicted with "X"s, so that the jurors would believe that there was no question but that cars and a fence were part of the scene. This is prejudicial to the Appellant's case since it adds veracity to the witnesses of the Government's statements which would be greater than the testimony without such pictures. There is no question but that the pictures, Exhibits 2A through 2F, which were admitted into evidence, did not fairly depict the area on December 16, 1976, and were therefore prejudicial.

POINT III

A DEFENDANT HAS NO OBLIGATION TO DO ANYTHING IN HIS OWN DEFENSE IN A CRIMINAL TRIAL AND THE GOVERNMENT'S STATEMENTS TO THE CONTRARY WITH RESPECT TO THE QUESTION OF HIRING AN INVESTIGATOR WERE PREJUDICIAL.

The Government in its summation (198) states,

"Mr. Mena, if you recall to the best of your recollection the testimony, he made virtually no effort to locate this individual even by his version of the facts to get this Carvol to corroborate his testimony. Perhaps, he was just happy not to have him here."

This statement was made by the prosecutor in this summation in the closing statement after the bench (161) had instructed the prosecutor that

"The defendant need not do anything. There is no duty on him."

The Court's direction to the prosecutor was in response to the following questions of the Government.

Q. When you were arrested with relation to this case, did you then think it was important for you to then to try

to locate the individual named Carvol?" (159)

Q. After you first saw the charges in this case which charged you with possession and distribution of cocaine on the night of December 16th, did you think it was important to try to contact Carvol? (159)

Q. Did you think it might be helpful for your case if you could locate the individual Carvol that you were with on the night on which you are charged with possessing and distributing cocaine? (160)

Q. Did you make an effort to find Carvol? (160)

Q. Did you at any time instruct your attorney to attempt to locate Carvol? (161)

Q. Did your lawyer hire an investigator to try and find him? (161)

These questions in and of themselves were so highly prejudicial that the Government brought questions to the minds of the jurors as to whether or not the defendant had an obligation to so hire an investigator. It also made it appear that the defense had failed in its obligation to bring Mr. Carvol before the stand. It is well known that "Perry Mason" in his famous trials, always brings a witness to the stand who completely vindicates the defendant. Thus, the jurors, having been already prejudiced by these questions and answers, were further prejudiced by the Government's summation in stressing the failure of the defense to bring in Mr. Carvol.

Not only does the Government make his statements in summation to prejudice the Appellant with regard to his failure to have an investigator find Carvol, but further the Government (147) attempts to prejudice the minds of the jury by inferring that Mr. Mena is having an immoral relationship with Anna Santiago while his wife and children are in Columbia. Specifically, the Government asked the following question:

Q. When you bring your wife and children here, will that change your relationship with Anna Santiago? (147)

Q. Let me ask you this. Is there some benefit which your family derives from your relationship with Anna Santiago? (147)

The Government sustained the objection to both these questions. However, the damage had already been done in the minds of the jurors.

The Government's tactics and statements showed a continued course of prejudicing the minds of the jurors against the Appellant, and show that the Appellant was not only a man of bad moral character but that he was attempting to hide the person known as Carvol. A reversal of the judgment of conviction by the jurors would thus be mandated in such a case.

POINT IV

THE GOVERNMENT SHOWED BAD FAITH
IN MAKING IT APPEAR THAT THE
APPELLANT COULD SPEAK ENGLISH
AT THE TIME THE CRIME WAS
COMMITTED.

In the cross-examination of the Appellant, the Government attempted to prove that the Appellant spoke English with agent Papantoniou (148). Mr. Lamb testified that the Appellant required help in making his transactions in English and that he spoke broken English (125, 126, 127).

The Appellant stated that he can say "Good Morning" in English (171); that he understands hardly any English (172); and that he has been given free English books and received help from a friend who speaks English while in Metropolitan Correctional Center. That Appellant now speaks better English. (173, 174)

Nevertheless, the Government's summation, concluded that the Appellant spoke English. Again, this is prejudicial to the Appellant and should not have been allowed.

CONCLUSION

For the above stated reasons, the judgment of conviction should be reversed and a new trial be ordered, or, in the alternative, a verdict of not guilty should be submitted.

Respectfully submitted,

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APPENDIX FOR APPELLANT

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1
2 MR. NELSON: The Government rests.

3 MR. TIRELLI: Your Honor, may we have
4 a sidebar?

5 THE COURT: Yes.

6 (Whereupon, the following takes place
7 at sidebar out of the hearing of the jury.)

8 MR. TIRELLI: Your Honor, I would like
9 to make a motion?

10 THE COURT: What is the motion based
11 on?

12 MR. TIRELLI: It is based on the testimony
13 that Agent Ridler just gave showing that his
14 testimony was substantially different from the
15 testimony of the other agents and I ask your
16 Honor for a directed verdict of not guilty for
17 Luis Mena.

18 THE COURT: That's denied.

19 (Whereupon, the sidebar concluded and
20 the following takes place within the hearing
21 of the jury.)

22 THE COURT: Are we ready to close, now?

23 MR. NELSON: Yes, your Honor.

24 MR. TIRELLI: Yes, your Honor.

25 THE COURT: I'll give you instructions

Q Showing you this chart again, could you tell us whether either one of the square represent where Agent Papantoniou's vehicle was?

A Yes. The one on the left-hand side, this one (indicating.)

Q Is this the Mena vehicle or the Papantoniou's vehicle?

MR. TIRELLI: Objection, your Honor.

BY MR. NELSON:

Q The left or the right vehicle? If you turn it the other way perhaps -- put it in front of you.

A This is approximately, it looks approximately where the Government vehicle was parked.

Q Do you recall from your vantage point which was to your left and which was to your right?

MR. TIRELLI: Indicating the vehicle with the M in it. If your Honor would ask him to point to what he is identifying --

THE COURT: Tell us what you are pointing at there?

THE WITNESS: This square on the chart here with the label M in it, is what I would believe the Mercedes Benz that Agent Papantoniou was driving. I saw him park the car in the

meeting underneath the B.Q.E.

BY MR. NELSON:

Q Let me ask you this question: Will you tell us what you saw?

A I observed another vehicle pull up and park. Pull up to Agent Papantoniou.

Q From your vantage point could you see vehicles to the left and to the right of you?

A I looked at the Government vehicle and it was to the right.

Q So you're saying that the Government vehicle would have been to the right?

A Correct.

Q Could you be mistaken?

MR. TIRELLI: Objection, your Honor.

THE COURT: Sustained.

MR. NELSON: But your Honor -- this is --

THE COURT: Don't, you can't answer it.

BY MR. NELSON:

Q In any event, Agent Ridler, did you see two vehicles next to you on that evening in question?

A Yes, I did.

Q What did you see then?

A I observed Agent Papantoniou exit his vehicle

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2 Q Agent Papantoniou, you have just told us that
3 these photographs were taken from the first four photographs,
4 were taken as you were progressing from Adelphi --

5 A From Carlton to Adelphi.

6 Q That would be over here?

7 A Yes.

8 Q They were taken from this area as you
9 progressed up. That is 2A was around here, 2B was around
10 here, 2C was around here and 2D was around here (indicating?)

11 A That's basically correct, yes.

12 Q These are the two photographs that were taken
13 on the other side?

14 A Yes.

15 Q What do the red squares depict?

16 A The vehicle I drove up, the undercover
17 Government vehicle and the 1969 green Pontiac.

18 Q Where is the Government vehicle with relation
19 to the Pontiac, is it to the left or to the right?

20 A To the left.

21 Q Were both vehicles pointed in the same
22 direction?

23 A Yes, that's correct.

24 Q They were pointing towards Park Avenue,
25 towards the part of Park Avenue which went in the direction

1
2 Q Did there come a time that you sold your
3 Pontiac, your 1969 Pontiac automobile?

4 A Yes.

5 Q When did you sell it?

6 A It was either the 19th or the 20th of December.

7 Q Of 1976?

8 A Yes.

9 Q How much did you receive for that transaction?

10 A \$900.00.

11 Q What did you do with the money?

12 MR. NELSON: Your Honor, I object to
13 that. I don't see the relevancy of that question.

14 THE COURT: I'll sustain it.

15 BY MR. TIRELLI:

16 Q So that on January 13th, 1977, you were not
17 the owner of a green Pontiac?

18 MR. NELSON: I object to the form,
19 your Honor.

20 THE COURT: Ask him whether or not
21 he owned it.

22 BY MR. TIRELLI:

23 Q Were you or were you not the owner of a
24 Pontiac on January 13th, 1977?

25 A No.

1
2 narcotics from any means other than from his own personal
3 sources.

4 Q When you proceeded to that position underneath
5 the Brooklyn-Queens Expressway, did the other agents take up
6 their surveillance positions?

7 A Yes, they did.

8 MR. NELSON: Can we have this marked
9 for Identification?

10 THE COURT: Why don't you mark them
11 2A, B, C, D, E, and F.

12 THE CLERK: Documents marked for
13 Identification as Exhibits 2A through 2F.

14 BY MR. NELSON:

15 Q Agent Papantoniou, I show you what has been
16 marked as Government Exhibits 2A through 2F and ask you if
17 you can identify those for us?

18 A Yes. I can identify them.

19 Q What are they?

20 A They are photos of the area where the meeting
21 took place with Luis Mena.

22 Q Do you know when these photographs were taken?

23 A Approximately two weeks ago.

24 Q Do they depict the area exactly as it was
25 seen on the night of the 16th, other than the cars are

different, for instance?

A That is correct.

Q Can you tell us whether the pictures seem to represent the area as you saw it on the night that you were there other than the vehicles which you say were not present there?

A Except for the fact that there was a fence up at the time.

Q Can you state where the fence was?

A Right along the curb on both sides.

Q Referring to Exhibit 2A, can you tell us, can you show us with a red pencil or mark with a red pencil the outline of the area where the fence was?

MR. TIRELLI: Your Honor, I object to this if it's to be shown to the jury. That's if it is not the exact premises.

THE COURT: You're not supposed to mark it.

MR. NELSON: I'm asking him your Honor, that he mark the area where the fence was. Not to draw in the fence but to mark an outline of the area.

THE COURT: That's not seen in the picture?

1
2 the testimony was that it took place between
3 11:30 and 12:00.

4 THE COURT: You have two minutes.

5 MR. NELSON: The same can be said of
6 the later transaction on May 13th and then
7 we get the story about Carvol. I submit to
8 you that if you are charged with a violation
9 of law you want to know where this individual
10 Carvol is. Mr. Mena if you recall to the best
11 of your recollection the testimony, he made
12 virtually no effort to locate this individual
13 even by his version of the facts to get this
14 Carvol to corroborate his testimony. Perhaps,
15 he was just happy not to have him here.

16 So, ladies and gentlemen, I think that
17 all of the pieces of the puzzle fall into the
18 mold. All fall into place. We have the cocaine
19 and we have the cocaine being possessed in the
20 Eastern District of New York and the testimony
21 was that it was sold and possessed by Mr. Mena.
22 The only contrary evidence is the testimony of
23 Mr. Mena itself. I submit to you that it is
24 not believable. There is overwhelming evidence
25 to the contrary. You heard the character witnesses

1
2 BY MR. NELSON:

3 Q Did you at any time instruct your attorney to
4 attempt to locate Carvol?

5 A Well, I was asked by my lawyer about what I
6 had done on that day but I didn't know where to find him.

7 Q Did your lawyer hire an investigator to try
8 and find him?

9 MR. TIRELLI: Objection, your Honor.

10 THE COURT: The defendant need not do
11 anything. There is no duty on him.

12 BY MR. NELSON:

13 Q All right, Mr. Mena. Let's go to the night
14 of the 16th. Is it your testimony that you were driving
15 the 1969 green Pontiac that evening?

16 A Whether I was driving that car?

17 Q Yes.

18 A Yes.

19 Q You were driving that car and Carvol got into
20 that car; is that correct?

21 A We met at the restaurant where he asked me to
22 take him over to this particular spot because he said he had
23 to see a girl.

24 Q That spot was where?

25 A It was Park Avenue and Adelphi Street in the

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Q When you were arrested with relation to this case, did you then think it was important for you to then to try to locate the individual named Carvol?

A No, because I didn't know why I had been arrested.

Q Well, do you recall that you and your attorney received a complaint in this action?

A I don't understand.

Q Well, have you ever seen the charges in this matter?

A The ones that were read to me the day before yesterday?

Q Have you seen those?

A Yes, the ones read to me the other day.

Q After you first saw the charges in this case which charged you with possession and distribution of cocaine on the night of December 16th, did you think it was important to try to contact Carvol?

MR. TIRELLI: Objection, your Honor.

THE COURT: I'll allow it.

A Why? Because I didn't know nothing about this. I don't know what the reason for the charges mean.

Q Do you know who you were with on the night of the 16th?

1
2 A No.

3 Q Didn't you just testify you were with Carvol
4 on the night of the 16th?

5 A Yes, but what you are asking is whether I was
6 with Carvol on that night.

7 Q You admitted that you were with Carvol on the
8 night of December 16th?

9 A Yes.

10 Q So, wouldn't it occur to you -- withdrawn.
11 Did you think it might be helpful for your case if you could
12 locate the individual Carvol that you were with on the night
13 on which you are charged with possessing and distributing
14 cocaine?

15 MR. TIRELLI: Objection, your Honor.

16 First of all, it goes to the workings of his
17 mind. I think it's entirely improper.

18 THE COURT: The form of the question
19 is bad. Whether he thought or not is not the
20 question. Did he make an effort to find him,
21 not whether or not he thought about it.

22 BY MR. NELSON:

23 Q Did you make an effort to find Carvol?

24 MR. TIRELLI: He never testified that
25 he didn't.

THE COURT: It's not responsive.

The last part of it.

BY MR. NELSON:

Q When you bring your wife and children here, will that change your relationship with Anna Santiago?

MR. TIRELLI: Objection as to what it will do. It's in the future.

THE COURT: It's speculative. The objection is sustained.

BY MR. NELSON:

Q Let me ask you this: Is there some benefit which your family derives from your relationship with Anna Santiago?

MR. TIRELLI: Objection, your Honor. Totally irrelevant, your Honor. It's prejudicial.

THE COURT: Will you repeat the question?

MR. NELSON: I withdraw the question.

BY MR. NELSON:

Q Now, Mr. Mena, am I correct that you speak no English?

A I do not speak English.

Q You do not speak English?

A I do not speak English.

1
2 Q So when you heard Agent Papantoniou testify
3 on the stand that you spoke English in your conversations
4 with him he was lying; is that correct?

5 A Yes, he was lying.

6 Q When Mr. Lamb the bank employee testified
7 here this morning he testified that you spoke broken
8 English --

9 MR. TIRELLI: Objection.

10 BY MR. NELSON:

11 Q (continuing) was he lying?

12 MR. TIRELLI: Objection, your Honor.

13 THE COURT: He used the words broken
14 English. Let the record reflect back and
15 you will find the words broken English.

16 MR. NELSON: I'll be happy to rephrase
17 the question.

18 BY MR. NELSON:

19 Q Mr. Lamb testified this morning that you had
20 spoken broken English in his presence, was he also lying?

21 A Well, I have gone to the bank for my trans-
22 actions. I have gone there three times.

23 MR. NELSON: I move that the answer
24 be stricken. Just answer yes or no.

25 THE COURT: Yes or no is the point.

of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. TIRELLI:

Q Mr. Lamb, where do you live?

A On Clove Road in Staten Island, New York.

Q And, where do you work?

A Chemical Bank at 50 Court Street.

Q What is your position in the bank?

A Installment Loan representative.

Q In your capacity as Installment Loan manager in the bank, have you ever seen the gentleman seated here with the red, white and blue shirt on?

A Yes.

Q Do you know his name?

A Luis Mena.

Q Has he transacted any business in your bank?

A He has made a few loans in our bank.

Q During these periods when he has had transactions in your bank, has he been able to speak the English language?

MR. NELSON: I object to the form --
withdrawn.

BY MR. TIRELLI:

Q During these transactions, has he spoken to

1
2 you or anyone in your presence in the English language?

3 A Very brokenly.

4 Q Does he speak English or doesn't he?

5 A Very little.

6 Q Is he able to make any transactions by himself?

7 A No.

8 MR. NELSON: I object to the form of
9 the question. That doesn't follow and I ask
10 that the answer be stricken.

11 THE COURT: Strike it out.

12 BY MR. TIRELLI:

13 Q Is he required to have assistance in making
14 transactions?

15 MR. NELSON: I object to the form of
16 the question.

17 THE COURT: I'll allow it.

18 A Whether he required or whether he asked for
19 it?

20 THE COURT: You're talking about speaking
21 assistance?

22 MR. TIRELLI: Yes, your Honor.

23 BY MR. TIRELLI:

24 Q Has speaking assistance been given to him?

25 A He usually brought someone in that spoke

1 English and could interpret for him.

2 Q Has anyone at the bank possibly acted as an
3 interpreter?

4 A One time or another.

5 Q Do you know if he has any loans with the bank
6 at this time?

7 MR. NELSON: I object to t e question,
8 your Honor.

9 THE COURT: I'll sustain the objection.
10 That's not material to the case.

11 MR. TIRELLI: Your Honor, I have no
12 further questions.

13 THE COURT: Any questions, Mr. Nelson?

14 MR. NELSON: One or two, your Honor.

15 CROSS-EXAMINATION

16 BY MR. NELSON:

17 Q Mr. Lamb, would you know whether outside your
18 presence Mr. Mena has ever spoken English?

19 A That I wouldn't know.

20 Q You wouldn't know whether he was able to do
21 so?

22 MR. TIRELLI: Objection. He's leading
23 the witness.

24 MR. NELSON: This is cross-examination.
25

REDIRECT EXAMINATION

BY MR. TIRELLI:

Q Mr. Mena, excuse me, I'm sorry. There is a question of your ability to speak English. Are you able to say simple words in English such as "good morning?"

MR. NELSON: I object to the question on the basis of form, your Honor. It's leading.

THE COURT: Well, ask him what he can say.

MR. TIRELLI: But it's redirect.

THE COURT: I think that the question is proper whether he can say "good morning."

MR. TIRELLI: You're permitting the question?

THE COURT: I'll allow it but I don't see the reason for it.

BY MR. TIRELLI:

Q Can you say "good morning?"

A Yes, I can say good morning.

THE COURT: Does he know what he means, when he transacts business in the Chemical Bank, the witness that was here before, Mr. William Lamb, do you use any English words with him at all?

THE WITNESS: Yes.

BY MR. TIRELLI:

Q What words?

A "Good morning, good morning Mr. Lamb." Then the person who was with me was saying Mr. Mena brought me as his interpreter --

MR. NELSON: Your Honor, I move to strike what he said in Spanish or in English.

THE COURT: Only what he said in English.

BY MR. TIRELLI:

Q Only what you said in English.

Q "Good morning Mr. Lamb." That's it.

Q That's what you said?

A Yes.

Q Do you understand a little bit of English?

A Hardly any English.

Q Can I tell you words like greetings or something like that?

A Yes.

THE COURT: How did you tell Mr. Lamb that you were looking for a loan; what did you say to him?

THE WITNESS: I didn't tell him, the interpreter that was with me, he was the one

who talked for me. I only agreed with him.

BY MR. TIRELLI:

Q Have you ever carried out any transaction in English?

A No.

Q So that you are capable of saying a few words in English?

MR. NELSON: I object to the form of the question.

THE COURT: I'll sustain it.

BY MR. TIRELLI:

Q The friends that you have, do any of them speak English?

MR. NELSON: I object to the question.

THE COURT: I'll sustain that.

BY MR. TIRELLI:

Q Do you ever speak to any of your friends in English; other than "good morning" or something simple like that?

A No. Now that I have been in other places I have been given free English books. First level, second level, third level, they were given to me since I don't have anything to do. I read this and sometimes some friends come to me. There is a Dominican friend who speaks English

1
2 and I asked him to teach me.

3 Q This is where?

4 A This is where I am now at the Metropolitan --
5 here at the M.C.C.

6 Q That's the Metropolitan Correctional Center?

7 A Yes. Where I am now.

8 Q Is that the Federal prison?

9 A Yes.

10 MR. NELSON: Your Honor, I object
11 to that question.

12 THE COURT: You're going completely
13 outside the scope of redirect at this point.

14 MR. TIRELLI: I have no further
15 questions, your Honor.

16 MR. NELSON: I have a few more, your
17 Honor.

18 RE-CROSS-EXAMINATION

19 BY MR. NELSON:

20 Q Mr. Mena, there is really only one area that
21 I want to ask you about and this is the issue of speaking
22 English. Mr. Mena, do you recall testifying this morning
23 that you speak absolutely no English?

24 A Yes. But I do speak --

25 MR. NELSON: I move to strike the rest

MR. TIRELLI: I have no further questions, your Honor.

CROSS-EXAMINATION

BY MR. NELSON:

Q Mr. Mena, I will try to make my questions very clear. If you don't understand any of them please tell me.

A Okay.

Q Mr. Mena, am I correct that the reason that you are in this country is to benefit your wife and children by earning more money for them?

MR. TIRELLI: I object. He's looking for a reason and that would be in the mind of the individual.

THE COURT: It's proper what his motivation is. I'll allow it.

A Well, I am here, I send her money but I am also trying to bring her here. I am preparing, I am having the work prepared. The papers. When I prepared my papers to go for my visa --

MR. NELSON: I ask that that part of the answer be stricken as totally unresponsive.

MR. TIRELLI: He's going into the reason for it.

PHOTOGRAPHS AS EVIDENCE

Expert testimony to interpret or explain or draw conclusion from photograph. 77 ALR 946.

Photographs and other demonstrative evidence on issue of negligence or contributory negligence at railroad crossing. 55 ALR 1340, 1343.

Use of photographs in examination and comparison of handwriting or typewriting. 31 ALR 1431.

Introductory Comment

Photographs present evidence to courts just as witnesses present evidence through testimony. Often, presentations are quicker, more accurate, more detailed and more convincing when photographs, rather than testimony, are used. Photographs standing alone, however, cannot become part of the evidence to be considered by the trier of fact; pictures must be qualified for admission by the testimony of witnesses. Except for those cases, not dealt with here, in which the photograph itself is the subject matter of the dispute (e.g., defamation, invasion of privacy, infringement of copyright, obscenity prosecutions), photographs are used to supplement, explain and replace the descriptive testimony of witnesses. They are offered in evidence as effective and convenient visual demonstrations of the facts they depict.

It is generally the rule that photographs, once admitted, are evidence no higher or lower in quality than ordinary testimony. However, in some situations, appellate courts have found photographs so authentic and convincing as to be conclusive on the issues and jury verdicts contrary to what the pictures showed have been overturned.

To be admissible in evidence, photographs must first be accepted by the judge as material and relevant to the issues being tried. That is, the contents of the photographs must not only relate to the issues, but the probative value of the photographic evidence must outweigh the policy considerations against its admission.

Photographs are relevant if they either assist witnesses in presenting and explaining their testimony or aid the jury in understanding the issues in the suit, but the trial judge must determine whether the assistance and enlightenment offered by a given photograph outweigh the confusion and undue prejudice that might result from its admission.

LOUIS A. TIRELLI

ATTORNEY AT LAW

December 23, 1977

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Clerk of the Court
United States Court of Appeals
Second Circuit
Foley Square
New York, New York

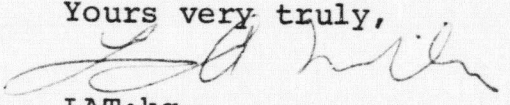
77-1415

Re: U.S. v. Luis A. Mena

Dear Sir:

Enclosed herewith please find eight (8) copies of Appellant's
Brief and Appendix in connection with the above-captioned action.

Yours very truly,


LAT:kg
Enclosures

P.S. I have also attached to the back of the original the Affidavit
of Service of one copy of the United States Attorney.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF ROCKLAND)

KAREN GOULD, being duly sworn, deposes and says:

1. That I am not a party to the within action and am over the age of 18 years.

2. That on December 23, 1977, I served a true copy of the annexed Brief and Appendix for Defendant-Appellant, by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed as follows:

STEVEN G. NELSON, ESQ.
Assistant U. S. Attorney
Eastern District of New York
Federal Building
Brooklyn, New York 11201

Sworn to before me this
23rd day of December, 1977.

15/ Karen Gould
KAREN GOULD

15/ LAT [Signature]
NOTARY PUBLIC

LOUIS A. TIRELLI
NOTARY PUBLIC, State of New York
Reg. No. 3089430
Residing in Rockland County
My Commission Expires March 30, 1979 9

